86-999

No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE STATE OF NEW YORK; ROBERT ABRAMS, ATTORNEY GENERAL OF THE STATE OF NEW YORK; JAMES P. CORCORAN, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK; and the NEW YORK STATE DEPARTMENT OF INSURANCE,

Petitioners,

vs.

ELIZABETH DOLE, SECRETARY OF THE DEPARTMENT OF TRANSPORTATION; THE DEPARTMENT OF TRANSPORTATION; DIANE STEED, ADMINISTRATOR OF THE NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION; and the NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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December 17, 1986

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QUESTIONS PRESENTED

1. Did the Department of Transportation heed this Court's direction that it keep safety concerns pre-eminent, overriding and paramount when it reconsiders its passive restraint motor vehicle safety standard?

2. Did the Department of Transportation act arbitrarily, capriciously, or illegally by allowing automobile manufacturers the choice of installing airbags or detachable or nondetachable automatic seat belts to comply with the re-promulgated passive restraint motor vehicle safety standard?

LIST OF PARTIES BELOW

The State of New York, Robert Abrams, Attorney General of the State of New York, James P. Corcoran, Superintendent of Insurance of the State of New York, the New York State Department of Insurance, State Farm Mutual Automobile Insurance Company, The National Association of Independent Insurers, Kent Mason, Patricia Warren, The American Insurance Association, Nationwide Mutual Insurance Company and the National Association of Insurance Commissioners were petitioners in the proceedings below. Elizabeth Dole, Secretary of the Department of Transportation, the Department of Transportation, Diane Steed, Administrator of the National Highway Traffic Safety Administration, and the National Highway Traffic Safety Administration were respondents below.

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The petitioners, the State of New York, Robert Abrams, Attorney General of the State of New York, James P. Corcoran, Superintendent of Insurance of the State of New York, and the New York State Department of Insurance (referred to collectively as "New York") request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in this proceeding on September 18, 1986.

OPINION BELOW

The majority opinion of the Court of Appeals for the District of Columbia Circuit is reported at 802 F.2d 474 and is reprinted in the appendix hereto, App. 1a, *infra*. The opinion of Circuit Judge Mikva, concurring in part and dissenting in part, is reported at 802 F.2d 489 and is reprinted in the appendix, App. 32a.

JURISDICTION

Invoking jurisdiction under 15 U.S.C § 1394(a)(l), the petitioners brought suit directly in the Circuit Court of Appeals for the District of Columbia. On September 18, 1986, the Court of Appeals entered a judgment and an opinion denying petitioners' challenge to the Department of Transportation's ("DOT") automatic restraint regulations. See App. 1a. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1), as further provided in 15 U.S.C. § 1394(a)(4).

STATUTES INVOLVED

The pertinent provisions of the Administrative Procedure Act, 5 U.S.C. § 706 and the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq*. ("Safety Act"), are set forth at App. 237a.

STATEMENT OF THE CASE

Petitioners urge this Court to remedy once again the United States Department of Transportation's ("DOT") unlawful exercise of its regulatory authority over motor vehicle safety. As it did in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983) ("*State Farm*"), this Court should redirect DOT's attention to its preeminent regulatory function – protection of life and limb on the roads – and away from its excessive reliance on what the automobile industry finds expedient.

Without review by this Court, DOT will implement its lenient 1984 passive restraint standard. Despite its mandate to save lives, DOT adopted, and the Court below affirmed, this lax standard in the face of DOT's own findings that other reasonable and practical alternatives would result in thousands of fewer highway deaths each year.

This Court in *State Farm* emphatically advised DOT that it should reconsider its arbitrary 1981 rescission of its passive restraint standard. DOT, the Court found, had failed adequately to explain why, if one passive restraint technology was found to be far less effective than had been thought earlier, that other more effective passive restraint technologies should not be required. DOT was specifically directed by this Court to keep safety concerns paramount when performing this reconsideration.

DOT has now ignored or rejected this Court's clear admonition. Finding detachable automatic seatbelts to be the least effective passive restraint technology, it nevertheless refused to require technologies, such as airbags, it found to be superior. In fact, it failed altogether to consider requiring what it found to be the safest alternative — airbags in tandem with seatbelts.

Background

This case presents another chapter in, and must be considered in the context of, what this Court called in *State Farm*, the "complex and convoluted history" of the passive restraint requirement in Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208.

In *State Farm*, this Court remanded to DOT a previous incarnation of that safety standard because of DOT's inadequate consideration of, *inter alia*, the safest passive restraint mechanism, *i.e.*, airbags. As this Court explained, Congress enacted the Safety Act in response to the consensus that the loss of life on our highways was unacceptably high, and that part of the solution to this problem could be found in improving the design and safety features of motor vehicles. The Safety Act directs the Secretary of Transportation or her delegate to issue motor

vehicle safety standards that shall meet the need for motor vehicle safety. *State Farm* at 33. This Court observed that, in its original 1967 form, Motor Vehicle Safety Standard 208 merely required the installation of seatbelts on all new automobiles. However,

> [i]t soon became apparent that the level of seatbelt use was too low to reduce traffic injuries to an acceptable level. The Department [of Transportation] therefore began consideration of "passive occupant restraint systems"—devices that do not depend for their effectiveness upon any action taken by the occupant except that necessary to operate the vehicle. Two types of automatic crash protection emerged: automatic seatbelts and airbags.

State Farm at 34-35.

Despite passive restraints' extraordinary potential to save lives and prevent serious injuries, the regulatory history of the requirement was anything but smooth. This Court recounted the on-again/off-again history of the requirement during the 1970's in great detail in *State Farm* at pages 34-37. Finally, as the Court noted, in 1977 DOT Secretary Adams issued a new passive restraint regulation, known as Modified Standard 208, which required the phasing in of passive restraints in all cars, starting with large cars in model year 1982 and extending to all other cars by model year 1984. Finding that both airbags and automatic seatbelts would provide approximately the same protection, the 1977 Modified Standard 208 allowed automobile manufacturers to choose either. The Modified Standard was upheld by the Court of Appeals in *Pacific Legal Foundation v. DOT*, 593 F.2d 1338 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979).

In 1981, however, DOT rescinded the Modified Standard 208 passive restraint requirement. Notice 25, 46 Fed. Reg. 53,419 (October 29, 1981). DOT determined that manufacturers had decided to install *detachable* automatic seatbelts in the overwhelming majority of all new cars in order to comply with the passive restraint requirement. *State Farm* at 38-39. Whereas in 1977 DOT had found that the particular technology chosen

by the manufacturers to comply with the standard would not significantly affect the number of deaths and serious injuries that would be prevented, by 1981 DOT found that it could not predict that *detachable* automatic seatbelts would prevent even a few more deaths or serious injuries than would be prevented merely by continuing to equip all cars with manual seatbelts. Yet the cost of requiring passive restraints, DOT then estimated, would be about $1 billion annually. However, instead of prohibiting the use of detachable automatic belts altogether, DOT simply rescinded the entire passive restraint rule.

Ruling on challenges to this rescission, the D.C. Circuit Court of Appeals found that DOT had inadequatedly considered the possibility of requiring manufacturers to install nondetachable, rather than detachable, automatic seatbelts. It also found that DOT had failed to give any consideration at all to requiring manufacturers to install airbags to comply with the standard. Finally, it found that DOT had insufficient evidence to conclude that installation of detachable automatic seatbelts would not yield significant increases in the prevention of deaths and serious injuries.

This Court reviewed that decision in 1983, and found that DOT had failed to supply the requisite reasoned analysis to justify its rescission. In particular, it unanimously held that DOT had failed entirely to consider requiring airbags, and had inadequately considered requiring nondetachable automatic seatbelts. A 5-4 majority also found that DOT had failed to consider adequately the "inertia factor" of detachable automatic belts – once attached, such automatic belts remain attached until an affirmative action is taken – in finding no likely increase in usage of these belts. The Court directed that the case be remanded back to DOT for it to "consider the matter further or adhere to or amend Standard 208 along lines which its analysis supports." *State Farm* at 34.

The present case

DOT did consider the matter further. It issued a notice of proposed rulemaking in 1983, received substantial comments

from numerous affected parties, and held a number of public hearings. 48 Fed. Reg. 39,908 (1983). It then issued a supplemental notice of proposed rulemaking to gather additional comments. 49 Fed. Reg. 20,460 (1984). Using the extensive evidence it had gathered in the rulemaking process, it prepared a Final Regulatory Impact Analysis ("FRIA") and issued its final rule, 1984 Standard 208. 49 Fed. Reg. 28,962 (1984), App. 49 a.

The 1984 Standard 208 essentially reinstates the substantive requirements of the 1977 Modified Standard 208 which DOT had rescinded in 1981. Like the 1977 Modified Standard, the 1984 Standard 208 requires the phasing in of passive restraints in new automobiles, over a period of several years, starting with 10% of model year 1987 cars and gradually increasing to 100% of model year 1990 cars. Further, like the 1977 Standard, the 1984 Standard 208 permits manufacturers to choose which passive restraint technology – airbags, detachable or nondetachable automatic seatbelts or other, as yet unperfected, technologies – to install to meet the requirement.

The 1984 Standard 208 contained one salient feature not found in the 1977 Modified Standard 208 – the so-called "trap door". If states with combined populations representing 2/3 of the total United States population adopt mandatory seatbelt use laws ("MULs") meeting DOT-established minimum criteria by April 1989, then the requirements for passive restraints in the 1984 Standard 208 would be automatically rescinded.

DOT in 1984 provided manufacturers the same freedom to choose which passive restraint technology to install as it had in 1977. In 1977, that choice seemed of little relevance, because, as this Court noted in *State Farm* at 34 and 47, at that time each passive restraint technology was viewed as essentially equivalent in saving lives and preventing serious injuries. Yet, in 1984, DOT found, based on an extensive record, that airbags were a far superior means of preventing deaths and serious injuries than automatic seatbelts, of either the detachable or nondetachable variety. DOT also found in 1984, unlike in earlier proceedings, that between automatic belt designs, the non-

detachable variety were likely to prevent more deaths and serious injuries.

In the face of these revised findings, DOT advanced a variety of reasons why it would nevertheless retain the manufacturers' perogatives. Further, DOT totally failed to consider requiring what it found to be the safest reasonable alternative – airbags together with nondetachable lap and shoulder seatbelts. By failing to consider requiring this reasonable alternative, DOT obviously also failed to explain why it did not adopt it.

New York challenged DOT's failure: 1) to require airbags; 2) to prohibit the use of detachable automatic seatbelts; and 3) to require the acknowledged safest reasonable alternative – airbags plus nondetachable automatic seatbelts. New York also joined in a challenge of the trap door provision brought by numerous other parties.[1]

In reviewing these challenges to DOT's 1984 Standard 208, the Court of Appeals held that the trap door issue was not yet ripe because it appeared singularly unlikely that the trap door would ever open (*i.e.*, rescission would likely never occur). *State Farm Mutual Automobile Insurance Company v. Dole*, 802 F.2d at 481, App. 16a. (D.C. Cir. 1986) ("*State Farm v. Dole*"). New York does *not* seek review of this part of the Court of Appeals decision.

New York's challenge to the substantive content of the 1984 Standard 208 was held ripe because the phasing in of passive restraints was to begin in September, 1986, and, the Court of Appeals reasoned

> [I]f New York is correct in asserting that the Final Rule [1984 Standard 208] is more lenient (and therefore less promotive of automobile safety) than

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[1] These parties included State Farm Mutual Automobile Insurance Company, The National Association of Independent Insurers, The American Insurance Association, Nationwide Mutual Insurance Company, and the National Association of Insurance Commissioners.

> is justified by the record, then many people, including New York citizens, may be adversely affected in the most direct way [i.e. they will die or suffer serious injury] by the Secretary's failure to require greater protection.

State Farm v. Dole, 802 F.2d at 485, App. 24a. On the merits of New York's challenge to 1984 Standard 208, however, a 2-1 majority of the Court of Appeals rejected each of New York's challenges.

New York submits that the majority of the Court of Appeals failed to review properly DOT's reasoning, and in so doing became a "rubber stamp" for the agency and let deference for the agency's judgments slip into "judicial inertia". See *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 469 U.S.89, 97 (1983). Had the Court of Appeals properly reviewed DOT's decision, the record DOT had amassed in its proceeding after *State Farm* would have led the court to require that DOT adopt a more stringent Standard 208. In that event, thousands of deaths and injuries would be prevented.

In essence, the Court of Appeals majority held that there are rational connections between facts found by the DOT and the choice it made in its decision, when, in fact, no such rational connections exist. It also found that DOT had conducted a reasoned analysis of an alternative which in fact DOT had not addressed at all. Further, the majority failed entirely to review DOT's decision in light of the finding by this Court in *State Farm* (at 55) that the Safety Act mandates that safety is to be the pre-eminent, overriding and paramount factor in adopting motor vehicle safety standards. In the face of a record that clearly demonstrates that DOT placed cost and public acceptability considerations above that of safety, this failure by the court below is a most glaring error. Finally, the majority misinterpreted the mandate which the Safety Act imposes on DOT, namely, to adopt standards that meet the need for motor vehicle safety, and thereby erroneously concluded that DOT had fulfilled that mandate.

REASONS FOR GRANTING THE WRIT

I. THOUSANDS OF ADDITIONAL DEATHS AND TENS OF THOUSANDS OF ADDITIONAL SERIOUS INJURIES ARE AT STAKE.

The sheer magnitude of the lives lost as a result of the leniency of the 1984 Standard 208 makes it of critical importance that this Court grant certiorari.

DOT estimated in 1984 that requiring airbags to be installed in new automobiles instead of requiring no passive restraints would result in between 3,780 and 9,110 fewer highway deaths each year.[2] If, instead of airbags, all cars were equipped with automatic seatbelts, DOT estimated between 520 and 7,510 fewer deaths each year depending on the usage rate of the automatic belts (estimated by DOT at anywhere from 20 to 70%) and their effectiveness.[3] Thus, DOT found that airbags would likely save substantially more lives, perhaps 2,500 or more per year, or over 50% more than automatic seatbelts.

DOT's 1984 findings regarding serious injuries prevented – those injuries with debilitating, disabling, painful and expensive consequences – are just as compelling in favor of airbags. Airbags, according to DOT, would prevent from 73,660 to 155,030 such injuries each year.[4] Automatic seatbelts, on the other hand, were estimated to prevent somewhere between

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[2] The actual number of deaths prevented will depend on how effective airbags turn out to be and whether people continue to use manual belts at all with airbag equipped cars or at the same rate (12.5%) as they were using manual belts in 1984. The mid-point estimate for lives saved by airbags, assuming that the current level of manual seat belt use (12.5%) continued, was 6,670 per year. See Table 5 at, 49 Fed. Reg. 28,986, App. 146a. and Table VI-6 of the FRIA.

[3] The mid-point estimate for automatic seat belts was 4,060 fewer deaths each year, assuming 50% usage of the automatic belts. See Table 5, 49 Fed. Reg. 28,986, App. 146a. and Table VI-6 of the FRIA.

[4] The mid-point estimate, assuming then current levels of seatbelt use (12.5%) and mid-range effectiveness for airbags, was 117,780 serious injuries prevented each year.

8,740 to 124,570 serious injuries each year, depending on the usage rate for automatic belts (estimated at anywhere from 20 to 70%) and their effectiveness.[5]

These findings sharply contrast with DOT's 1970's findings, as noted by this Court in *State Farm* at 35 and 47, that both technologies appeared essentially equivalent in saving lives and preventing injuries. In 1977, for example, then DOT Secretary Adams found that automatic belts would have a usage rate of at least 60%, and would provide protection essentially equivalent to that of airbags. *See* 42 Fed. Reg. 34,298. In contrast, DOT Secretary Dole found in 1984 that the usage rate for automatic belts would be in the range of 20-70%. In sum, installation of automatic belts would be unlikely to save as many lives or prevent as many injuries as would an airbags requirement. Despite this finding, Secretary Dole refused to require manufacturers to install airbags.

Moreover, in addition to not requiring airbags, Secretary Dole also continued the use of detachable automatic belts as an option for meeting the passive restraint requirement. While she explicitly rejected setting different usage rate ranges for the two types of automatic seatbelts, she did find that

> The agency believes that some increment of usage should be imputed to nondetachable belts, since some effort would be required to deactivate the system. However, because the information available does not permit such precision, separate usage bounds for detachable and nondetachable belts are not estimated. Usage rates for future nondetachable automatic belt systems would probably be above usage rates for future detachable systems, with both rates falling within the estimated 20-70% usage range.

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[5] The mid-point estimate was 68,230 serious injuries prevented, assuming mid-range effectiveness and 50% usage rate of the automatic belts. See Table 5, 49 Fed. Reg. 28,986, App. 146a. and VI-6 of the FRIA.

FRIA at V-44. See also 49 Fed. Reg. 28,984 and 28,996, App. 138a, 182a.

Thus, while DOT did not quantify the differences between detachable and nondetachable automatic seatbelts in terms of the lives saved and serious injuries prevented, it clearly found that usage would be higher for nondetachables, thereby preventing significantly more deaths and serious injuries.

Finally, Secretary Dole failed to require what DOT found to be the most effective system—an airbag plus a lap and shoulder belt. 49 Fed. Reg. 28,986, App. 145a. This, of course, is equivalent to the alternative of requiring an airbag *and* a nondetachable automatic belt in all new cars. The Secretary failed to even consider adopting this option, let alone give rational reasons to reject it. Obviously, then, she did not make findings to show quantitatively how many lives would be saved by this option. Nevertheless, close examination of the record reveals what is intuitively obvious: requiring airbags plus nondetachable belts is a much safer alternative than the one DOT adopted.[6]

In summary, DOT's decisions, affirmed by the majority of the court below, will result in thousands of additional highway deaths, and tens of thousands of serious injuries each year compared to the number of lives that could have been saved and injuries prevented had the Secretary selected any one of a number of reasonable alternatives.

With such extreme consequences flowing from DOT's decision, it is critical that this Court fully review whether the court below properly found that DOT's lenient 1984 standard 208 was

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[6] DOT found that as seatbelt usage increased with airbag-equipped cars, the number of lives saved rapidly increased. Airbags alone would save 3,780 to 8,630 lives per year. Airbags with 12.5% lap and shoulder belt usage would save 4,570 to 9,110 lives each year. See Table 5, 49 Fed. Reg. 28,986, App. 146a. DOT estimated that if belt usage with airbag-equipped cars increased as the result of MULs, 20,000 additional lives would be saved in the first 10 years. See FRIA at VI-28.

lawful and in accord with the record made by DOT subsequent to the *State Farm* decision.

II. THE MAJORITY COMPLETELY FAILED EVEN TO CONSIDER WHETHER DOT HAD PROPERLY KEPT SAFETY CONCERNS PRE-EMINENT, OVERRIDING AND PARAMOUNT WHEN IT ADOPTED ITS 1984 STANDARD 208.

This Court found in *State Farm* at 55,

> . . . Congress intended safety to be the *pre-eminent* factor under the Motor Vehicle Safety Act:
>
> The Committee intends that safety shall be the *overriding* consideration in the issuance of standards under this bill . . . S. Rep. No. 1301, at 6, U.S. Code Cong. and Admin. News 1966, p. 2715 . . . Motor vehicle safety is the *paramount* purpose of this bill and each standard must be related thereto . . . H. Rep. No. 1776 at 16. (Emphasis supplied.)

Although this Court had clearly directed DOT to give safety an overriding weight in adopting a standard, DOT again failed to do so. Naturally, safety is not the only factor that DOT should consider. Feasibility, cost, adequate leadtime, and public acceptability must all be considered, but must be subordinate to safety. DOT explicitly found other safer alternatives were practical, feasible, *reasonable in cost* and *generally acceptable to the public*. See 49 Fed. Reg. 28,996, 28,988, 29,003, App. 182a, 152a, 208a. But, because DOT did not see those alternatives as the *most* cost-effective or because those alternatives *might* have engendered greater public acceptability problems than other, less effective alternatives, DOT adopted a weakened standard.

Despite New York's emphasis on the safety-first requirement, and the dissent's specific reference to this Court's admonition in the *State Farm* decision, the majority of the Court of Appeals found, without even a mention of the requirement, that

there was nothing arbitrary, capricious or unlawful about DOT's adoption of its lenient passive restraint standard.

Moreover, the Safety Act requires that the DOT or its delegate adopt motor vehicle safety standards that "meet the need for motor vehicle safety". 15 U.S.C. §§ 1391(2) and 1392(a). "Motor vehicle safety" is defined by the Safety Act to mean

> . . . the performance of motor vehicles or motor vehicle equipment in such a manner that the public is protected against. . . . *unreasonable risk* of death or injury to persons in the event accidents do occur. § 1391(1) (Emphasis supplied.)

The Court of Appeals has on several occasions explained what constitutes unreasonable risk under the Safety Act. See *U.S. v. General Motors*, 518 F.2d 420 (D.C. Cir. 1975), *U.S. v. General Motors* 561 F.2d 923 (D.C. Cir. 1977) and *Center for Auto Safety v. Peck*, 751 F.2d 1336 (D.C. Cir. 1985).

In those cases, the Court of Appeals essentially found that risk is unreasonable if it can be eliminated by effective means that are feasible and the costs are reasonable. In other words, safety, while not the only consideration, is paramount and overriding.

The Majority Failed To Determine Whether DOT Had Kept Safety Paramount In Refusing To Require Airbags.

The overly lenient 1984 Standard 208 grants automobile manufacturers carte blanche to choose between installing airbags, or detachable or nondetachable automatic seatbelts to comply with the standard.

However, the safety equivalency between airbags and automatic seatbelts that DOT had found to exist and which had formed the basis for offering manufacturers the choice of technology in the 1977 Standard 208, was found in 1984, after

thorough study, not to exist. Therefore, a change in circumstance – the newly found ineffectiveness of automatic belts compared to airbags – required DOT to fully explain why it chose again to allow the manufacturers to choose between air bags and automatic belts, as it had in 1977. *State Farm* at 57.

The Court of Appeals held that DOT had properly looked at the high cost and alleged public acceptability problems of airbags in deciding not to require them. 802 F.2d 487-489, App. 28a-30a. But no one ever asserted in this case that DOT should not consider cost and public acceptability in making its determination. Rather, the central issue was the *weight* to be afforded to those considerations.

DOT, as the dissent below noted, had explicitly found the cost of airbags to be reasonable, and the technology to be cost-effective. 49 Fed. Reg. 28,996, 28,963, 28,991, App. 182a, 56a, 164a. Similarly, DOT had found that airbags did not suffer unmanageable public acceptability problems. 49 Fed. Reg. 28,988, 29,001 App. 152a, 202a. Once such threshold findings had been made, the superiority of airbags should have dictated, consonant with the safety-first standard, that they be required.

By affirming DOT's decision, the majority of the court below determined that a safety device which is practical, the most effective in saving lives, cost- effective, reasonable in cost, and which enjoys considerable public acceptance need not be required if it is not the cheapest safety technology or if there are some unfounded public acceptability concerns. Thus watered down, safety becomes but one of many factors to be considered, with no special weight.

In insisting that DOT *did* consider safety when it refused to require airbags, 802 F.2d 488, App. 29a, the majority missed the point. See dissent at 802 F.2d 496, App. 43-45a. Obviously DOT had considered safety and. indeed, had specifically found that airbags were superior to automatic seatbelts, a finding on which New York relied throughout. 49 Fed. Reg. 28,963 and 29,000, App. 56a, 197a-198a. The issue which the majority of

the court below refused to address, even though petitioners raised it repeatedly, was DOT's failure to give overriding, preeminent and paramount weight to the safety advantages of airbags.

The Majority Also Ignored The Safety-First Mandate In Reviewing DOT's Decision Not To Prohibit Detachable Automatic Belts.

The majority also affirmed DOT's failure to prohibit the use of *detachable* auton atic seatbelts.

DOT had found this type of automatic belt to be the least effective passive restraint technology in saving lives and preventing serious injuries. DOT had also found that the alternatives to detachable belts – nondetachable automatic seatbelts and airbags – were reasonable in cost. In fact, it found that the cost of detachable and nondetachable automatic belts was similar. 49 Fed. Reg. 28,989, App. 158a. Moreover, DOT had found nondetachable automatic belts to be considerably safer than detachable belts because of their greater expected usage rate. See 49 Fed. Reg. 28,996 and 28,984, App. 182a, 138a, and FRIA V-44.

Despite these lesser safety benefits, the majority of the Court of Appeals nevertheless accepted DOT's reasons for not prohibiting detachable belts. Pointing to DOT's arguments that nondetachable belts were the most coercive passive restraint and that requiring them would mean the demise of the center front seat, the majority found that these considerations outweighed any safety deficiencies of the detachable belts.

Once again, the majority missed a very obvious point – eliminating the alternative of detachable belts does not, in itself, mean that nondetachable belts are the only alternative. This Court made it very plain in *State Farm* that if detachable belts are not adequate, then airbags *or* nondetachables could be used. *State Farm* at 47 and 55. Thus the undesirable consequences of prohibiting detachable belts presumed by the majority of the Court of Appeals can be obviated by giving people a choice

between nondetachable belts and airbags. Also, cars with center seats could have airbags instead of automatic belts. Indeed, as New York made clear, DOT could have easily eliminated the center seat issue altogether simply by allowing detachable belts for the minority of cars now equipped with a center seat. Cars without such a seat would have to have airbags or nondetachable belts. The majority of the Court of Appeals recognized this argument, but simply opined, without explanation, that rejection of this and other solutions to the center seat problem was not arbitrary or capricious. 802 F.2d 487, App. 27a-28a.

Similarly, the majority of the Court of Appeals found the coerciveness of nondetachable belts a valid reason to endorse DOT's acceptance of detachable belts. The court failed to consider that a consumer choice of air bags or nondetachable belts may well decrease public acceptability concerns with each. DOT itself gave this rationale for offering consumers a choice of three technologies. 49 Fed. Reg. 28,997, App. 185a. The court also ignored, as fully explained below, DOT's characterization of these public acceptability problems of nondetachable belts as "primarily speculation". 49 Fed. Reg. 29,003, App. 208a.

The Majority Failed To Determine Whether DOT's Failure To Require Airbags In Tandem With Nondetachable Belts Was Consonant With The Overriding Weight To Be Accorded Safety.

Finally, the majority of the Court of Appeals affirmed DOT's *sub silentio* decision not to require what DOT itself found to be the safest alternative—airbags with a three point seatbelt (*i.e.* a nondetachable belt). After finding, on the thinnest of evidence, that DOT did consider this alternative, the majority then found that DOT did not act arbitrarily or capriciously in rejecting this alternative. The majority finds that DOT's reasons for not requiring either airbags or nondetachable belts are equally germane to not requiring both in tandem. The majority never analyzed whether the added safety which would result if the technologies were required in tandem, might outweigh the negative factors DOT identified with regard to requiring either

one of the technologies alone. Further, the majority never considered that some presumed public acceptability problems, such as the unfounded fears that airbags will not work when needed, are reduced or eliminated if both technologies are used in tandem.

In summary, the majority of the Court of Appeals rejected all arguments by New York – and the dissent – that this Court has specifically directed DOT to place safety above all other considerations in adopting safety standards. The total failure to apply this standard, which is firmly established by this Court and based on the clear legislative history of the Safety Act, was a significant error which will result in thousands of deaths and serious injuries each year.

III. THE MAJORITY ERRED IN FINDING DOT'S CONCLUSIONS, WHICH WERE CLEARLY CONTRARY TO THE WEIGHT OF EVIDENCE IN THE RECORD, TO BE REASONABLE AND RATIONAL.

The Court of Appeals found DOT's conclusions to be reasonable, rational and supported by the weight of the evidence in the record, when in fact just the opposite was the case.

The Majority Mischaracterized DOT's Cost-Effectiveness Rationale As A Simple Finding That Airbags' Costs Were Too High.

Although acknowledging that DOT had concluded that airbags prevented more deaths and serious injuries than automatic seatbelts, the majority accepted DOT's reasons for not requiring them.

Significantly, the court misstates DOT's own explanations as to why it did not require airbags. DOT's decision must stand or fall on the reasons *it* used to explain its actions, not those presented by DOT's counsel, or created by the Court of Appeals. See *State Farm* at 50, citing *SEC v. Chenery*, 332 U.S. 194 (1947).

The court states that DOT found air bags to be quite expensive—$320 initially and $800 to replace once deployed. Noting that this Court had held in *State Farm* that costs are to be considered, the majority then states

> In light of these cost estimates, the Secretary concluded that the safety benefits of airbags would not be worth their high cost. *State Farm v. Dole* at 488, App. 29a.

To the contrary, DOT found the cost of airbags to be reasonable, well within the range of what people are willing to pay for them, and cost effective. 49 Fed. Reg. 28,996, 28,988, 28,990, App. 182a, 152a, 159a. In fact, DOT inserted incentives in its new standard 208 to encourage the installation of airbags by manufacturers. 49 Fed. Reg. 28,963, 29,000, App. 56a, 197a-198a.

DOT's reasons for not requiring airbags are more complex than those cited by the Court of Appeals. At 49 Fed. Reg. 29000 to 29001, App. 199a, under the heading "Costs" DOT does recite that airbags will cost an additional $320 above the cost of manual belts and that replacement cost for the air bags will be $800. But it then goes on to say

> On the other hand, automatic belts would only add $40 for the equipment, $11 in increased fuel costs and would not adversely affect physical damage and comprehensive insurance premiums. Thus, although airbags may provide greater safety benefits, when used with belts, and potentially larger insurance premium reductions than automatic belts, *they are unlikely to be as cost effective.* (Emphasis supplied.)

Thus, high cost, *per se*, was not the issue—rather it was DOT's finding that airbags are less *cost-effective* than automatic seatbelts.

DOT's rationale and the majority's silent acceptance of it has two flaws. First, nothing in the record supports DOT's conclusion that airbags are likely to be less cost-effective than automatic

belts. It certainly does not follow that simply because airbags cost more than automatic belts, they are therefore less cost effective, as DOT seems to imply at 49 Fed. Reg. 29001, App. 199a. A greater saving of lives and prevention of serious injuries could more than make up for the higher cost of airbags.

The closest that DOT comes to supporting a finding that automatic belts are more cost-effective than air bags is at 49 Fed. Reg. 28,997, App. 184a-185a, and in the FRIA at Chapter XIII. Using insurance premium reductions alone as estimates of benefits, DOT concludes that airbags have a net cost (*i.e.* lifetime cost of airbags minus lifetime insurance premimum reductions) of $206 to $288. Automatic belts, depending on their usage rate, have a net cost of between $44 and minus $93 (*i.e.* a net benefit of $93)[7]. But DOT is most careful (at 49 Fed. Reg. 28, 996, App. 184a) not to read too much into this net benefit analysis. They state

> The net result of any calculations will only provide information on *measurable* benefits. They would *not represent the full benefits* of reducing fatalities and injuries because the department cannot measure the value of human life or a reduced injury. It cannot adequately measure, for example, the value of pain and suffering or loss of consortium. (Emphasis supplied.)

Despite this caveat, DOT apparently relies heavily on its cost/benefit analysis in refusing to require airbags.

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[7] DOT never expressed its calculations in terms of cost/benefit ratios. These ratios are easily calculated, however, from DOT's cost and benefit findings. Airbags have a cost/benefit ratio of from 4.79 to 2.30 ($364 divided by $76 to $364 divided by $158) whereas automatic belts range in cost/benefit from 7.28 to .35 ($51 divided by $7 to $51 divided by $144). See Tables 7 and 8, 49 Fed. Reg. 28,987 and 28,989, App. 150a, 156a. The range of cost/benefits depends on the usage rate of automatic belts and the effectiveness of the two technologies. The lower the ratio, the more cost effective the technology. Airbags, thus, may be more or less cost effective than automatic belts, by DOT's figures, depending on the usage rate of the automatic belts and the effectiveness of the two technologies.

Of greater importance than its concededly flawed cost/benefit analysis, however, is DOT's highly questionable position that the alternative of requiring airbags can be rejected because they are less cost-effective than are automatic belts. DOT never explained how it determined that a safer, cost-effective (*albeit* perhaps not the most cost-effective) alternative may be rejected. Certainly the Safety Act does not require DOT to require $30,000 safety systems on each car, no matter how much safety improvement would result. However, where the cost of a device is found to be reasonable, where the safety impact is considerable, where the device is cost-effective considering both safety benefits and costs, the Safety Act does not allow DOT to reject the option because its cost/benefit ratio is not as good as a cheaper, less effective system. Such a conclusion could only result if cost was given equal weight to safety. But, as discussed in Point II, safety is to be weighted more heavily, a point which DOT first concedes at 49 Fed. Reg. 28,996, App. 183a. and then ignores.

The majority also makes much of the fact that airbags cost $800 to replace and that DOT feared that such a cost would result in many cars going without replacement airbags. This, the court found, was a safety concern, not one of cost. 802 F.2d 488, App. 29a. However characterized, DOT recognized that the problem of non-replacement was not a significant one and found that only 2% of cars would be without airbags at any one time. 49 Fed. Reg. 28,984, App. 138a, 139a. That is because, as DOT explicitly found, airbags do not accidentally deploy, as the majority of the court below conjectured. Compare 802 F.2d 488, App. 29a., to 49 Fed. Reg. 28,984, App. 138a. Further, the replacement cost in many cases will be provided by insurance. See 49 Fed. Reg. 28,990–28,991, App. 161a-162a.

The availability of airbags was hardly a safety concern for DOT. The majority below spins this argument out of thin air. And, in any event, DOT could not rationally have considered a 2% nonavailability rate for airbags to be more serious than a 20%–70% usage rate for automatic belts.

The majority thus mischaracterized DOT's cost rationales for rejecting an airbag requirement. Rather than focusing their attention on DOT's stated rationale of lower cost-effectiveness, the majority cites its own rationale— high cost, *per se*—and then states that DOT can consider cost.

The majority of the court below should not be allowed to a) create reasons for DOT that DOT itself did not rely on in its decision; b) ignore review of DOT's real reason — presumed lower cost-effectiveness of airbags; and c) accept DOT's misguided reading of its mandate that it can reject highly superior technologies because they do not provide as much protection per dollar as cheaper, less effective alternatives.

The Majority Affirmed DOT's One-Sided Reliance On Unfounded Public Acceptability Concerns Regarding Airbags.

The majority of the court below also pointed to DOT findings that there are unfounded public concerns about airbags which, while they can be adequately addressed, must be recognized as real concerns. As the dissent notes, DOT also found that among the surveys in the record

> Airbags were rated highest on comfort, convenience and appearance and were perceived to be safer than other restraint systems by infrequent belt users. Primary concerns expressed about airbags relate to reliability, whether they will work when needed or deploy accidently, and cost. 49 Fed. Reg. 28,988, App. 152a.

In fact, DOT found that airbags are highly reliable, do work when needed, do not deploy accidentally, and that the costs are within the range of what people are willing to pay. 49 Fed. Reg. 28,984, 28,988 and 28,990, App. 138a, 152a, 159a. As the dissent explains, the public acceptability record runs both ways with airbags. DOT may not look only at the negatives and ignore the positive public acceptability considerations of airbags.

With a mixed record on the public acceptability of airbags, it is clear that, at the least, airbags are generally acceptable to the public. The majority affirms DOT's decision to let the limited public acceptability concerns over airbags override their clear safety advantage.

The Majority Failed To Do A Searching Review of DOT's Reasons For Continuing To Permit Detachable Automatic Belts.

The majority of the Court of Appeals also found that DOT had not acted arbitrarily or illegally in failing to prohibit the use of detachable automatic belts. They point to the public acceptability concerns with nondetachable belts and the fact that requiring them would make the center seat difficult to use.

As noted above, the majority erroneously equated rejecting detachable automatic belts with requiring nondetachable belts. See p. 15.

But even assuming that prohibiting detachable belts is the equivalent of requiring nondetachable belts, the majority erroneously states that DOT found the public acceptability problems with these belts to be persuasive. The majority ignores DOT's own conclusions regarding nondetachable belts. At 49 Fed. Reg. 29,003, App. 208a., DOT says

> The Department has no new evidence that nondetachable belts are not an *acceptable* means for reducing deaths and injuries. Although there are some comments in the current docket that some people will dislike them and may even cut them or otherwise destroy them, it is *primarily speculation*; there is no clear data. Moreover, even if 20 or 30 or even 40 or 50 percent of the people find some method for defeating the belt, the evidence in the record indicates that it will still result in a significant reduction in deaths and injuries for the remainder that do not. (Emphasis supplied.)

And DOT says at 49 Fed. Reg. 29,002, App. 207a,

> It could also be argued that the public will not accept automatic belts because of such problems as their obtrusiveness and inconvenience. Although an argument about public acceptability can be made, strong data on which to base it do not exist.

This is hardly a finding that public acceptability problems of nondetachable automatic belts are significant enough to forego their clear advantages. Rather, DOT *speculates* that nondetachables are too coercive, and even though concededly providing superior safety to detachables at no increase in cost, nevertheless continues to permit detachables.

DOT's second rationale cited by the majority is that outlawing detachable belts would mean the end of center seats. As the dissent points out, this is not the case. 802 F.2d 495, App. 42a. The minority of cars with center seats could use airbags, already perfected, motorized automatic belts which engage when passengers enter the car, or even detachable belts.

The majority finds that DOT's failure to set different standards for cars with center seats, was not arbitrary or capricious. Strangely, the majority did not explain why a complicating factor for a minority of the cars sold should be allowed to downgrade the safety requirements for the majority of cars.[8]

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[8] This contrasts with DOT's recent decision that convertibles need not have passive restraints at all during the phase-in period, noting that the Safety Act provides the flexibility to tailor standards to different types of vehicles. See 51 Fed. Reg. 37,028. (October 17, 1986).

IV. THE MAJORITY FOUND THAT DOT HAD CONSIDERED THE ALTERNATIVE OF REQUIRING BOTH AIRBAGS AND NONDETACHABLE AUTOMATIC SEATBELTS, AND HAD GIVEN RATIONAL REASONS FOR REJECTING THAT ALTERNATIVE, WHEN IN FACT DOT DID NOT CONSIDER THIS ALTERNATIVE AT ALL.

Most curious of all of the majority's conclusions was that DOT had in fact considered and rationally rejected the alternative of requiring airbags in tandem with nondetachable belts.

Acknowledging that DOT had an obligation to consider this practical, technologically feasible option, the majority concedes that DOT's treatment on this point was "scarcely a model of clarity". 802 F.2d 489, App. 30a. Nevertheless, they find, apparently on the basis of two words in the title to a subsection of the decision ("Airbags and/or Nondetachable Seatbelts" at 49 Fed. Reg. 29,002, App. 203a), that DOT did consider this option. The majority opines

> had the Secretary intended in this section to address only the option of requiring airbags or nondetachable seatbelts, one would think she would have chosen to entitle this subsection differently than she did.

802 F.2d 489, App. 31a, and holds that

> it seems clear to us that this discussion [in this subsection] was intended to respond both to the argument that detachable belts should be eliminated as a means of satisfying the passive restraint requirement and to the argument that nondetachable belts should be required in tandem with airbags.

802 F.2d 489, App. 31a.

The majority, in attempting to divine DOT's intent twists DOT's own words beyond recognition. The subsection reads, in toto,

> *Airbags and/or Nondetachable Seatbelts*:
> The rationals [sic] provided in the preceding sections for adopting the new rule and for not retaining the old rule or amending it to require airbags in all cars essentialy [sic] provides [sic] the basis for the Department's decision not to amend the old rule to require *either* airbags or nondetachable belts *or* just nondetachable belts; (i.e. *would not permit the use of detachable belts to comply with the automatic protection requirements*). It is also concerned that nondetachable belts may be too inconvenient and restrictive resulting in serious adverse public reaction if required in all cars. (See the discussion on nondetachable belts in the first part of the "Analysis of the Alternatives".) (Emphasis supplied.) 49 Fed. Reg. 29,002, App. 203a.

Thus, DOT states that this section is about not permitting the use of detachable belts to comply with the automatic protection requirement. As DOT notes, it could have accomplished this either by allowing a choice of airbags or nondetachable belts, or by requiring non- detachable belts. It chose, then, to reject this option because of the cost-effectiveness and public acceptability issues surrounding airbags and its concerns that nondetachable belts may be too inconvenient or restrictive.

As the dissent notes, there is not a single word in this section even suggesting the option of requiring *both* airbags *and* nondetachable belts. The use of "and/or" in the title, particularly when read with the text, means little more than that this section was intended to consider an alternative which allows either airbags or nondetachable belts (but not detachables) to be used and an alternative which requires nondetachable belts.

The majority again impermissibly creates reasons for the agency's action that the agency itself did not provide. *State Farm* at 50. Morever, even if the use of "and/or" in the title signifies that the agency considered this option, the subsection itself hardly provides a rational basis for rejecting it. It is not at all

obvious that even if the safety benefits of each technology alone do not outweigh their problems, therefore the enhanced safety benefits of the two technologies in tandem do not outweigh their combined cost and public acceptability problems. At the very least, then, DOT must do such a weighing of these factors for the in-tandem alternative. Obviously they did not, and the majority holding means that they need not.

This Court should fully review DOT's failure to adopt or ever consider the conceded safest alternative — airbags in tandem with nondetachable belts.

CONCLUSION

For the foregoing reasons, petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

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